Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

April 1 to June 30, 2007

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Production Summary

- The active inventory totalled 5,053 (26% over the target of 4,000 cases). This is an encouraging reduction from the previous quarter result of 5,176 and is the lowest recorded figure since mid-2004.

- Incoming appeals numbered 952 and of these, 813 were appeals from WSIB decisions and 139 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 830 new appeals and 196 reactivated appeals recorded in the first quarter of 2007.
  - In the 2nd quarter of 2006 the Tribunal recorded 988 new appeals and 136 re-activations.
  - In 2006, the weekly average of hearing ready appellants was 64. For Q2 2007, the weekly average of hearing ready appellants is 58. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,131; this includes 366 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 765 after hearing dispositions; of the after hearing dispositions, 731 followed from Tribunal decisions.

- The inactive inventory decreased by 12 cases to 4,106 (at the end of Q1-07, the inactive inventory was 4118 cases).

- In Q2 2007, 89% of final decisions were released within 120 days. In 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments have enabled an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2007, the notice inventory included 1,297 dormant cases, the active inventory totaled 5,053 cases, and the inactive inventory totaled 4,106 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2005	5156
Q2-2005	5351
Q3-2005	5378
Q4-2005	5288
Q1-2006	5320
Q2-2006	5418
Q3-2006	5496
Q4-2006	5231
Q1-2007	5176
Q2-2007	5053

B. Incoming Appeals

Period	Incoming Appeals
Q1-2005	1122
Q2-2005	1198
Q3-2005	1056
Q4-2005	1100
Q1-2006	1144
Q2-2006	1124
Q3-2006	1087
Q4-2006	1009
Q1-2007	1026
Q2-2007	952

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1189	465	724
Q1-2006	1146	435	711
Q2-2006	1131	477	654
Q3-2006	1083	426	657
Q4-2006	1161	362	799
Q1-2007	1148	382	766
Q2-2007	1131	366	765

D. Inactive Inventory

Period	Inactive Inventory
Q1-2005	4190
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302
Q4-2006	4234
Q1-2007	4118
Q2-2007	4106

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Activities

Keep up to date with Tribunal news using an RSS feed! The Tribunal's web site is www.wsiat.on.ca; instructions are located at the bottom of the home page.

In early May, Vice-Chair Registrar M. Keil and Early Review manager, N. Bisson, spoke with the Injured Workers' Consultants Group.

Also in May, Tribunal Staff and Vice-Chairs spoke at a continuing legal education session, organized by the Workers' Compensation Section of the Ontario Bar Association.

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second quarter of 2007, as well as the status of other proceedings, are set out below.

Particularly noteworthy during this quarter was the fact that leave to appeal was granted by the Court of Appeal from a Divisional Court decision which had quashed Tribunal Decisions Nos.433/99 and 433/99R.

Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. **Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)**

   A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

   The judicial review was heard in Sudbury on October 5. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing Decisions Nos. 433/99 and 433/99R.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

This is the first time a decision of the Tribunal has been quashed on judicial review in twenty-one years. The Tribunal filed a Notice of Motion for Leave to Appeal. The Court of Appeal granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau and Killeen). It is anticipated this will be heard by the Court of Appeal in the fall.

2. Decisions Nos. 1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. The judicial review was heard by a Divisional Court panel of Carnwath, Matlow, and Jennings on March 9. The Court released its decision on April 2, unanimously dismissing the application for judicial review.

Following a helpful summary of the application of the standard of review of patent unreasonableness as it applied to the Tribunal, the Divisional Court found the Tribunal acted within its area of expertise in refusing to consider the wage rate in the collective agreement. The Court also found the Tribunal had applied the correct provisions of the *WSIA*, and the Tribunal's conclusions were based on the evidence and not patently unreasonable. The Court rejected the argument that the Tribunal was required to consider the effect of the collective agreement by virtue of the Supreme Court of Canada's decision in *Tranchemontagne v Ontario (Director, Disability Support Program)*, since the collective agreement was not "law".

Counsel for the worker has filed a notice of motion for leave to appeal to the Court of Appeal.

3. **Decision No. 855/03 (November 15, 2005)**

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard on June 27. The Divisional Court Panel of Jennings, Swinton and Lederman reserved. At the end of this quarter the decision had not been released.

4. **Decisions Nos. 172/02I (February 28, 2002), 172/02 (September 22, 2003) and 172/02R (June 30, 2004)**

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In Decision 172/02 the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9th, 1998. A further request to reconsider for the period benefits was dismissed.

The worker commenced an application for judicial review. After taking no action on the application for a considerable period, the Divisional Court Registrar advised counsel for the worker that if the judicial review was not perfected by

May 10th it would be dismissed. Counsel for the worker perfected the judicial review just prior to the deadline. The Tribunal will be filing a responding factum.

5. **Decisions Nos. 167/06 (March 9, 2006) and 167/06R (December 14, 2006)**

The worker injured his back in May 1990. He received benefits until November 1992. The worker continued to complain of pain in his back, but medical investigation was unable to determine an organic cause for the reported pain. The worker appealed to the Tribunal for entitlement for benefits on the basis of chronic pain disability, or in the alternative on the basis of organic entitlement. The worker claimed that his family doctor had provided an inaccurate, intemperate and unprofessional medical opinion that should not be relied upon.

The Vice-Chair refused to discount the opinion of the family doctor. He also relied upon the opinions of other doctors, and evidence relating to a subsequent accident which called into question the genuineness of the worker's complaints.

The worker commenced an application for judicial review. At the end of the quarter the Tribunal was preparing its Record.

Actions

Li v. Cirrina, Workplace Safety & Insurance Appeals Tribunal, and Workplace Safety & Insurance Board

An injured worker's appeal was denied by a decision of Ms Cirrina, an Appeals Resolution Officer at the WSIB. The worker appealed that decision to the Tribunal. Subsequent to filing her appeal, the worker commenced a Small Claims Court action for $4,000 against the Board, Appeals Resolutions Officer Cirrina, and the Tribunal.

It was not clear why the worker had named the Tribunal as a defendant in the action. A lawyer in Tribunal Counsel Office contacted the worker. On April 8th the worker withdrew her claim as against the Tribunal

Human Rights Complaint

A worker appealed for entitlement for benefits for traumatic mental stress, which he alleged was caused by harassment by his supervisor at the workplace. In Decision 1180/06 a three-person Panel of Tribunal adjudicators denied the appeal, finding that the worker did not sustain a traumatic mental injury in the course of employment so as to entitle him to benefits under the *WSIA*.

The worker filed a Complaint with the Ontario Human Rights Commission, alleging discrimination on the basis of disability and reprisal against the Tribunal

and all three panel members who had decided his appeal. The reason for the Complaint against the Tribunal and the panel members appears to be that the worker wants to change the decision in his appeal.

The Respondent Tribunal and panel members have filed an Answer to the Complaint. The Respondents' position is that this Complaint should be dismissed pursuant to section 34 of the Human Rights Code on the grounds that the Complaint should be dealt with more appropriately under other legislation, the Complaint is not within the jurisdiction of the Human Rights Commission, and the Complaint is frivolous, vexatious and made in bad faith.

It is the Respondents' position that there is no evidence whatsoever in support of the Complaint, that the panel members made a decision pursuant to their statutory mandate and in accordance with the Tribunal's exclusive jurisdiction, and that there is absolute immunity from a proceeding such as this by virtue of the *WSIA* and the requirements of public policy as set out in a number of decisions of the courts. While the worker may apply for a reconsideration of the Tribunal's decision, or bring an application for judicial review, the Human Rights Commission has no jurisdiction to change an adjudicative decision of the Tribunal.

At the end of the quarter this matter was still pending.

Highlights of Recent Decisions

Reconsiderations: Decision No. 871/02R2 (I.Strachan, B.Wheeler, F.Jackson) contains a thorough discussion of the threshold test for determining whether to reconsider a Tribunal decision. The statutory and adjudicative context in which the Tribunal's reconsideration power is exercised is contrasted to the reconsideration power at other Tribunals. The reconsideration remedy is exceptional and only invoked in unusual circumstances. The applicant must demonstrate that there is a fundamental error of law or process, or substantial new evidence not available at the original hearing, which would likely result in a different decision. Substantial new evidence must be of superior quality and so logically persuasive that it could be described as practically conclusive of the issue under appeal.

Right to Sue: Decision No 14/06 (J. Moore). There has been ongoing discussion in Tribunal case law about whether, in the absence of a lawsuit, the current Act permits a statutory accident benefits insurer to apply to the Tribunal for a determination of whether the insured is entitled to claim workplace insurance benefits. Under the previous legislation it was clear that an insurer could do so. The issue arises because the word "plaintiff" now appears in section 31(1) (c) of WSIA. Decision Nos. 465/06 and 2035/06 found that the insurer could not apply where there is no action. Decision No.14/06 agreed with Decision No.1362/06I in reaching the opposite conclusion. The Vice-Chair found that when an accident occurs in circumstances which confer the right to either

commence an action or claim benefits under s.30(1), the parties described in s.31, which include an insurer, may apply for a determination of a person's status.

Occupational Disease: In Decision No. 2378/06 (B.Cook, E. Tracy, D.Broadbent) the employer successfully appealed the Board's finding that the worker had entitlement for prostate cancer due to exposure to radiation and welding fumes at a nuclear power generating facility. Neither the epidemiological evidence nor the worker's actual exposure supported a significantly increased risk for prostate cancer. Also, the worker developed the cancer at an age where there is a significantly increased risk of developing the cancer due to non-occupational causes.

Authority to Represent a Deceased Worker's Estate: Decision No.2352/06I (S. Martel, J. Seguin, D. Besner). From time to time the Tribunal has to decide whether a person has authority to act on behalf of a deceased worker's estate in order to appeal the worker's entitlement to benefits during his or her lifetime. The issue in this case was the authority of a common law spouse to act on behalf of an estate where there was no will. When there is not a will, the Tribunal generally does not require that a certificate of appointment be obtained if immediate beneficiaries consent to the applicant bringing the appeal. The worker's wife and children from his marriage could not be located. In determining who beneficiaries are, the Tribunal is guided by the Succession Law Reform Act. Under the SLRA, spouses and children are generally entitled to share in an estate, but the definition of "spouse" in that Act does not include common law spouses. While the common law spouse could pursue an appeal for survivor's benefits in her own right, she did not have authority to bring an appeal on behalf of the estate without a certificate of appointment as the estate trustee.

Non-Economic Loss (NEL): Decision No. 1529/04I (R. McCutcheon, J. Donaldson, D. Beattie). NEL awards are payable when workers suffer permanent impairment as a result of a work injury. They are rated using the rating schedules in the AMA Guides. In some circumstances, Board policy indicates that a NEL award must be combined with prior NEL awards using the Combined Values Chart in the Guides. This generally results in a reduced award. The Board has changed its policy over time and the Tribunal has taken different approaches in the past. The Panel agreed with Decision No.119/04R that, the Board's more recent policy, Operational Policy Manual Document No.18-05-05, explicitly intends that the Combined Values Chart to be used to reduce NEL awards of workers with prior NEL awards. The Policy did not lead to an absurd result and was not genuinely ambiguous. The hearing will reconvene to hear Charter and Human Rights arguments.

Interpretation and Application of s. 126: Decision No.878/06R (E. Smith) contains an interesting discussion of the interpretation of s.126 in the context of the Board's policy regarding employment insurance (EI) benefits and the calculation of a worker's earnings under the pre-1997 Act. The Board submitted that a 2001 policy was applicable and that therefore EI was not earnings for the purpose of determining earnings basis. Board policy had been amended in 2001 to generally prohibit the inclusion of EI, and to apply to all decisions on or after April 1, 2001, regardless of accident date. Section 126 requires the Tribunal to apply Board policy, but the Tribunal has jurisdiction to interpret the meaning of policy. It must do so in a manner consistent with the legal principles

governing retroactivity, including the strong presumption against retroactivity. Under s.126, the policy in effect at the time of the relevant determinations must be applied. To avoid an unfair result, "decision" in the 2001 policy must be read to refer to the Board's operating level decision. In this case, because the operating level decision pre-dated 2001, an earlier policy applied. Decision No. 878/06R also comments on the Board's process for notifying the Tribunal about policy and the Tribunal's jurisdiction to apply relevant policy even if it does not receive notification from the Board.

Deduction from Benefits of Amount Paid by Employer: In Decision No.2455/06 (J. Moore) the worker appealed the Board's deduction from his benefits of an amount he received from the employer due to a settlement of a grievance regarding long-term disability benefits. The Decision concluded that the deduction was permitted under s. 45(1) of the pre-1997 Act which provides for having regard to payments a worker receives from the employer in respect of the accident. The grievance settlement was related to a claim for long- term disability benefits which arose out of the same facts giving rise to the compensation benefit claim. Section 18 which states that a worker cannot waive benefits was not intended to negate rights conferred elsewhere in the Act.

S. Adams
July 2007